IN THE

Supreme Court of the United States

October Term, 1960

No. 37

FRANK WILKINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

Nanette Dembitz,
Rowland Watts,
c/o American Civil Liberties Union,
156 Fifth Avenue,
New York 10, N. Y.,
Attorneys for Petitioner.

INDEX

Table of Cases

IN THE

Supreme Court of the United States

October Term, 1960

No. 37

FRANK WILKINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

A basic point in all respondent's arguments is that petitioner's efforts to rally public sentiment against Congress' continuing the House Committee on Un-American Activities, even if *a* reason for its subcommittee interrogating him, was not the sole basis for the question he refused to answer.

To support this position, respondent repeatedly enumerates various other subjects which it states were under consideration by the subcommittee (Resp. Br. 26-27, 33, 34, 37). But it is the contempt conviction of a particular individual, the petitioner, with which we are here concerned. The issue is: in connection with what subject was petitioner called and to what subject was questioning *him* pertinent. In the course of this Reply, we shall show that investigation of petitioner's public agitation against

the Committee was the subcommittee's sole purpose, and furthermore that the question addressed to petitioner must be viewed in this context in order to satisfy the requirement for a contempt conviction of pertinence to a subject purportedly under inquiry. Thus viewed, the question asked petitioner was an unprecedented extension of Committee power, outside the subcommittee's authority, and a violation of the First Amendment.

Reply to Point I (Resp. Br. pp. 34-42)—Subcommittee's Lack of Authority

The topics which respondent indicates were subjects of inquiry by this subcommittee were (1) Communist infiltration of industries in the South; (2) dissemination in the United States of Communist propaganda from abroad; (3) the Party's organization and re-constitution; and (4) Communist propaganda activities, including efforts to abolish the F.B.I. and the Committee (Resp. Br. pp. 34, 37).

A. While we doubt that the third topic, the internal structure of the Party, should be deemed a subject of this investigation,[1] it in any event was clearly outside the scope of the authority delegated by the House Committee to the subcommittee (see Committee Resolution, R. 79-80). Among other limitations in paragraph 1 of the Committee Resolution, it is to be noted that the whole purpose of the subcommittee's holding hearings on the designated subjects in the South was for it to investigate local Southern matters rather than general and national problems.

Respondent seems to take the question of authorization lightly when it suggests that the subcommittee had authority to investigate the Party's re-constitution because para-

[1] Except for the statement by the chairman of the subcommittee after petitioner's refusal to answer, there seems to be no mention of this subject in the hearings, either in the statements of purpose or the questioning of witnesses.

graph 3 of the Committee Resolution empowers the subcommittee to investigate any other matter the Committee or subcommittee "may designate" (Resp. Br. 41). There is no indication whatsoever that this grant of power was exercised and any designation made (see R. 80). Again, respondent reads the provision of the House resolution granting authority for investigations by the Committee "as a whole or by subcommittee" (R. 75) to mean that any subcommittee automatically has the power to investigate everything within the jurisdiction of the full Committee (Resp. Br. 28, 40-41).

Respondent thus ignores the need for a delegation by the Committee, and indeed ignores limitations the Committee imposes on its agents. Here the Committee made some effort to instruct the subcommittee on the desired information and to establish guide lines to channel its investigation in the light of the work and legislative purposes of the whole Committee. Nevertheless, respondent would disregard the Committee's steps to satisfy the need for a clear line of authority from the Congress to the interrogating body,[1] and would nullify the procedural and substantive restrictions it imposed on its subcommittee.

B. As to Communist infiltration of Southern industry and Communist propaganda from abroad, which respondent states were also subjects of the investigation, we would concede arguendo that these topics were within the authority conferred by Congress on the Committee and within the authority re-delegated by Committee Resolution to the subcommittee. However, the subcommittee did not

---

[1] The requirement of clear authorization from the Congress for the compulsions exerted by the subcommittee, is dictated not only by the provision of the contempt statute that the witness must have been summoned "by the authority of either House of Congress", but by due process as well. See *Sweezy* v. *New Hampshire*, 354 U. S. 234, 245, 252, 254.

subpoena petitioner to interrogate him on either of these subjects.

Except for the statement that petitioner would be questioned as to the re-constitution of the Communist Party (R. 157), which clearly seems an afterthought "for the record" and in any event was not an authorized subject, all indications at the hearing were that he was to be questioned on his public protests against the FBI and the Committee (R. 157). To reduce generalities to tangible reality, there were the "Party activities" and "communist work" (Resp. Br. 38, 39; R. 29-30) on which petitioner was to be interrogated. Thus, the authority to investigate infiltration in industry and foreign propaganda could not validate the question asked of petitioner since his interrogation was not related to either of these subjects; and such authority was further irrelevant because, as we show below in our Reply to Point II, the question petitioner refused to answer was not pertinent, within the meaning of the contempt statute, to either of these subjects.

C. As to the fourth matter stated by respondent to be a subject of the investigation, we would concede arguendo that Communist propaganda activity of some types was a subject within the authority delegated by the House to the Committee and by the Committee to the subcommittee. But we urge that this authority did not include investigation of efforts to rally public sentiment for a legislative change abolishing the Committee.

We suggest that the term "un-American propaganda" in the House Resolution establishing the Committee (see Resp. Br. p. 40), though heretofore interpreted very broadly, has been thought to apply to activity of a more covert and insidious nature, directed at infiltration and inculcation of a belief in overthrow of the government by force and violence. In both cases in this Court in which the Committee's authority has been in issue, this element

was alleged to be present. *Barenblatt*, 360 U. S. at pp. 129-130; *Watkins*, 354 U. S. at p. 204. The term has not heretofore been construed to apply to open expressions addressed to the public in favor of legislative change—change which is of course the antithesis of either insidious or violent efforts at overthrow.

Thus, to construe "un-American propaganda" to cover such expressions would give the Committee and its subcommittee an even broader authority than it has heretofore been deemed to have. Differing from the authority claimed in *Barenblatt* (see 360 U. S. at p. 121), neither the Committee nor any of its subcommittees has heretofore claimed the power now asserted; and certainly Congress has in no way ratified it. Until now it has been assumed that a legislative committee, like other governmental bodies, must endure the shafts of criticism in the market place of opinion.

Finally, we invoke the principle that an authorization will, if possible, be construed to avoid a constitutional danger zone (see *United States* v. *Rumely*, 345 U. S. 41). Here as in *Rumely*, neither the Congressional nor the Committee Resolution should be construed to authorize investigation of efforts to influence the public for and against legislation, because of the grave First Amendment problem posed by such an authorization.[1]

---

[1] The lack of relation between this area of investigation and the legislative purposes stated in the Committee Resolution (R. 79, see *infra*, p. 12), is an additional cause for doubt that the Committee intended to authorize the subcommittee to investigate in this area.

Reply to Point II (Resp. Br. pp. 42-50)—Lack of Pertinence of Question to Authorized Subject of Inquiry

1. Respondent errs in asserting petitioner cannot raise the issue of the impertinence of the question he refused to answer unless he raised this objection at the subcommittee hearing (Resp. Br. pp. 42-46). The pertinence of the unanswered question to the subject under inquiry is an element of the crime of contempt, as defined by 2 U. S. C. 192, and must be established to sustain a conviction (See *Barenblatt*, 360 U. S. at p. 123; *Watkins*, 354 U. S. at p. 208). Even if it were true that petitioner cannot contend pertinence was *unclear to him* unless he voiced a pertinence objection at the hearing, this condition does not apply to his argument that pertinence was in fact lacking. An actual lack of pertinence of the unanswered question to the subject of inquiry can not be remedied by explanation by the committee.

Respondent supports its position that an objection by the witness permits the committee to remedy the lack of pertinence, with the argument that "the committee can even change the subject under inquiry if that is necessary to make the question pertinent." (Resp. Br. p. 44). Respondent's view that the requirement for a contempt conviction of a "question under inquiry" is an ephemeral one, easily obviated, must be rejected. Respondent's concept bears on the point in our main brief that the subcommittee's investigation lacked a definite subject of inquiry, in which we assumed there would be no debate on the principle that such a subject was required, as well as on the need for a pertinency objection; we therefore shall briefly discuss the nature of this requirement.

The very form of the indictment—that the defendant "was asked a question which was pertinent to the question then under inquiry" (R. 1)—recognizes the traditional understanding that the unanswered question must be pertinent to a subject to which the Committee has been directing its inquiry. A change of "subject" from question to question or as an afterthought to a question, would cancel out the requirement of a subject for the investigation.

A definite "question under inquiry" in the investigation is not only in itself a statutory requirement for the crime of contempt and a statutory condition precedent to the existence of pertinence,[1] but we submit it is also a constitutional requirement. Unless the committee or subcommittee has settled clearly upon a subject for inquiry, neither Congress, the committee, nor the courts can determine whether the investigation is within the committee's authority and whether it is directed at matters on which the legislature needs information.[2] An invasion of privacy through a committee subpoena and interrogation must find justification in terms of a legislative need for information; this principle must at the least mean that the committee has deliberated sufficiently on the need for information so as to fix a subject or subjects of inquiry.

Respondent does not reply directly to the argument in our main brief that there was no sufficiently definite subject under inquiry in this investigation. It seemingly refrains from arguing that the question under inquiry in these hear-

---

[1] Because 2 U. S. C. 192 provides that the question the witness refuses to answer must be "pertinent to the question under inquiry". "The initial step in determining the pertinency of the question is to ascertain the subject matter of the inquiry then being conducted by the committee." *Bowers* v. *United States*, 202 F. 2d 447, 448 (C. A. D. C.).

[2] Consider *Barenblatt*, 360 U. S. at p. 124; *Sweezy*, 354 U. S. at pp. 245, 254; *Watkins*, 354 U. S. at pp. 200-201, 206, 209.

ings was defined and limited by the four topics it mentions as subjects of the subcommittee's concern, and this argument would not be tenable.[1]

B. Assuming *arguendo* the subcommittee had determined on the subjects stated in respondent's brief as the subjects of the hearing and assuming *arguendo* that they were sufficiently definite, the issue then is whether and how the question petitioner refused to answer was pertinent to an authorized subject of inquiry.

Respondent's overly simple argument on pertinence (Resp. Br. pp. 47-48) totally ignores the principle that the pertinency of the question to the subject of inquiry depends primarily on the connection of the witness with that subject. That is, the question "Are you a member of the Communist Party" is pertinent to the subject of inquiry if the Committee has reason to ask it in terms of a probability of securing information from the witness about that subject. Thus in *Barenblatt* the Committee was investigating Communist infiltration in education and the Committee had information the witness had been a member of student organizations. The propriety of Barenblatt's conviction for refusing to answer the same question here in issue,

---

[1] The Committee Resolution on which respondent relies as establishing subjects of the hearings is only an authorization. It cannot establish the question the subcommittee in fact took under inquiry, and there is no statement at the hearings limiting them to the authorized subjects. And respondent itself at times relies on the broad and all-inclusive statements at the opening and close of the hearings by the Committee and subcommittee chairmen and by the Staff Director (Resp. Br. 34-37, 48; R. 80-81, 227-228, 156).

In any event, we suggest that "Communist Party propaganda activities in the South," one of the subjects stated in the Committee Resolution, is too broad to satisfy the requirement of a definite subject. Construed to include petitioner's expressions of opposition to the Committee, as it would have to be for relevance in this case, it would include any type of expression by anyone alleged to have a Communist connection.

whether he was a Communist Party member, was upheld on the basis that he was "refusing to answer questions relating to his participation in or knowledge of alleged Communist Party activities at educational institutions in this country" (360 U. S. at p. 115). It was on the basis of this construction of the unanswered question, we believe, that it was held "pertinent to the subject matter of the investigation" (360 U. S. at p. 123). It was because the information about Barenblatt indicated he was likely to have knowledge of facts related directly to the subject of the investigation, that this Court said in upholding his conviction:

> "Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee." (360 U. S. at p. 134)[1].

Unless there is probable cause for interrogating the witness in the particular investigation, it is an unreasonable invasion of his privacy, unjustified by legislative need, to subpoena and question him, and due process is violated. See also *Watkins*, 354 U. S. at p. 198; *Sinclair* v. *United States*, 279 U. S. 263, 292. The violation of the Constitution is underlined when, as here, the interrogation infringes on First Amendment rights in addition to the general right to freedom from governmental intrusion.

On respondent's theory anyone who has been alleged, whether falsely or truly, to be connected with the Communist Party could be subpoenaed in any investigation and asked whether he is a Communist, regardless of probable cause for the Committee to believe he has information on

---

[1] Two Courts of Appeal have similarly indicated that the requirement of pertinence or probable cause necessitates information connecting the witness with the subject of investigation. *Rumely* v. *United States*, 197 F. 2d 166, 177 (C. A. D. C.) aff'd 345 U. S. 41; *United States* v. *Orman*, 207 F. 2d 148, 154-155 (C. A. 3).

the subject under inquiry. We submit the requirement of pertinence, both as a statutory and constitutional matter, precludes such a fishing expedition. There must be more than a mere desire by the Committee to interrogate a witness on various matters to see if it may come upon information—more than a mere *possibility* of utility—to warrant an invasion of his privacy and an interference with his constitutional rights.

The rule of probable cause is, we suggest, followed not only as a matter of fairness, but as a matter of common sense, practicality, and efficiency in the great bulk of the work of investigating committees.

* * *

The only basis on which respondent could attempt to establish probable cause in this case is that petitioner had been engaged in "setting up rallies and meetings over the country for the purpose of engendering sentiment against the Federal Bureau of Investigation, against the security program of the government, and against the Committee on Un-American Activities and its activities" (R. 30). And we would concede *arguendo* the subcommittee was entitled to infer that he intended to continue this activity against the Committee in Atlanta (See R. 38-39, 156). Other than this, its information about him related to the formation of a group of professional people in California (R. 158) and possibly in Chicago (R. 156), information which obviously had no bearing on the subjects the subcommittee was authorized to investigate or, according to respondent, was investigating. In the testimony of the chief voluntary witness Penha, as to infiltration of Communists into Southern industry (R. 27, 29), there was no word indicating petitioner had any connection therewith or knowledge thereof (R. 83-102, 167-168); nor is there any indication otherwise that the subcommittee had probable cause to believe petitioner had knowledge as to this activity. The same is true as to the other leading witness and the subject of his testimony, entry of propaganda from abroad (R. 109-117).

Thus the only one of the subjects that respondent alleges were under inquiry, to which the unanswered question could have been pertinent, was the subject of propaganda in the sense of public criticism of the Committee. This type of communication with the public was not, as we have already argued, included in the "un-American propaganda" the subcommittee was authorized to investigate (*supra*, pp. 4-5). Accordingly, petitioner's conviction is invalid because the question he refused to answer was not pertinent to an authorized subject of inquiry.

Reply to Point III (pp. 50-60)—Unconstitutionality of Interrogation of Petitioner

As we have already asserted, the constitutionality of the subpoena and interrogation of petitioner must be judged on the basis of the subcommittee's purpose to question him as to public criticism of the Committee. It must be so judged not only because this was the subcommittee's primary purpose (*supra*, p. 4), but because only in this context would the question have been pertinent to any subject which was purportedly authorized and purportedly under inquiry. It is to be noted that the court below squarely recognized that the validity of petitioner's interrogation must be appraised on the basis of his "aggressive opposition to the continued functioning of the Committee" (R. 69).

On one side of the balancing process which determines constitutionality (Resp. Br. p. 50), is the legislative pur-

---

[1] Petitioner was told that this was the primary point of the inquiry when he refused to answer on First Amendment grounds (R. 156-8). The statement that he would be questioned about reconstitution of the Party must have seemed secondary and an afterthought.

It may be noted that petitioner appeared before the Committee in the interim between this Court's *Watkins* and *Barenblatt* decisions.

pose to be served by the witness' interrogation. In this case the legislative purposes to be served by the investigation are stated in the Committee Resolution authorizing the subcommittee hearings, the first being to obtain information relative to amendment of the statute penalizing membership in the Communist Party (R. 79). The relation between public protest against the Committee and this legislative issue seems entirely lacking; certainly such protest could not, under our constitutional system, be considered a reason for imposing a penalty on those thought to be engaged in it.

The other legislative purpose is to add "to the Committee's overall knowledge * * * so that Congress may be kept informed and thus prepared to enact remedial legislation in the National Defense, and for internal security, when and if the exigencies of the situation require it" (R. 79). It seems doubtful that this purpose shows a sufficiently compelling legislative need to justify any invasion of Constitutional right. In any event, as we pointed out in our main brief, there does not seem to be any relation between public agitation against the Committee or appeals to the public to support legislative change, and defense or security. The justification found in *Barenblatt* for that investigation, in terms of Congressional concern with infiltration of our institutions for the purpose of indoctrinating persons in the goal of overthrow of the government (360 U. S. at pp. 115, 129-130), cannot be found in this case.

Going outside the purposes stated in the Resolution, respondent suggests there was a legislative purpose in the Committee's investigating criticism of it because of its annual efforts to secure Congressional authorization and appropriations (Resp. Br. 54). On this reasoning of course, almost every committee could subpoena its critics for interrogation. Respondent supports its argument with reference to legislation requiring disclosure of political contribu-

tions[1] and of persons engaged in direct lobbying activities; the court below had similarly reasoned that there was power to legislate, and therefore to investigate regarding "interference with the legislative processes and their functioning" (R. 69). But this Court has never indicated that a disclosure requirement can be applied to those who address the public on the pros and cons of legislation, nor that such activity can be considered an interference with legislative processes. See *United States* v. *Rumely*, 345 U. S. 41; *United States* v. *Harriss*, 347 U. S. 612. "Congress has no power in respect to efforts to influence public opinion" on legislation.[2] Such activity is beyond the reach of legislation because it is the heart of the democratic process. Congress cannot curtail "the right of a citizen of the United States to take part, for his own or for the country's benefit, in the making of federal laws and * * * the right to speak or write about them * * *" (*Gilbert* v. *Minnesota*, 254 U. S. 325, 337, Brandeis, J. dissenting).

In sum, we do not see that any legislation could be had on the subject on which the Committee was seeking information from petitioner: his attempts to persuade the public to support legislation abolishing the Committee.

And we do not believe there is anything in the *Barenblatt* opinion to justify respondent's inference that the Congressional investigative power has a more pervasive scope than its legislative power (Resp. Br. pp. 30-31, 51, 55). On the contrary, this Court has continued to assert that an inves-

---

[1] In *Borroughs* v. *United States*, 290 U. S. 534 (Resp. Br. p. 34), which dealt with political contributions, there was no consideration of the First Amendment, but only of federal as against state power with respect to presidential electors.

[2] *Rumely* v. *United States*, 197 F. 2d 166, 173 (C. A. D. C.) aff'd 345 U. S. 41.

tigation must be "related to a valid legislative purpose", and that an investigation must stand in aid of the power to legislate (*Barenblatt*, 360 U. S. at p. 127); that the Congressional investigative power is "to obtain the facts needed for intelligent legislative action" (*Watkins*, 354 U. S. at p. 187). Here, the area of investigation was "an area in which Congress is forbidden to legislate"; to this area the investigative power does not extend. *Quinn* v. *United States*, 349 U. S. 155, 160-161.

Assuming *arguendo*, however, that the subject of petitioner's interrogation had some relationship to a potential subject of legislation, it would take more than "the mere semblance of legislative purpose" to justify the interrogation (See *Watkins*, 354 U. S. at p. 198). When First Amendment rights are affected by the investigation, the "'subordinating interest of the state must be compelling'". *Barenblatt*, 360 U. S. at p. 127. Respondent has not recognized the importance in the balance between legislative interest and constitutional rights in this case of this element: the drastic effect on First Amendment rights.

It cannot be doubted that validation of the Committee's power to subpoena and interrogate its critics and opponents would deter public protest and agitation for legislative change and thus curtail the exercise of basic First Amendment rights (Compare *Watkins*, 354 U. S. at p. 198). The overt and established activity in a case such as petitioner's is his public protests against the Committee; the alleged and suspected fact, based on information from a witness who is not subject to confrontation, is his Communist connection. Thus, anyone engaging in public opposition to the Committee is subject to subpoena if only someone be found who alleges that he has a Communist connection. The situation is similar to *Rumely* where a committee sought to investigate persons distributing books to influence the views of the recipients on legislation. Though the com-

mittee may have suspected the distributors were violators of the Lobbying Act, the Court of Appeals invalidated the investigation because it would deter people generally from participating in efforts to influence the public's view on legislation and thus curtail this First Amendment right (197 F. 2d at pp. 172, 174, 180).

It must be emphasized that when persons engaging in an activity can be investigated to determine if they have any Communist connection, that whole field of activity is laid open to the investigators. Thus, when the State of Alabama attempted to investigate the membership of the National Association for the Advancement of Colored People as such, this Court held the State had not shown "a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." *N.A.A.C.P.* v *Alabama*, 357 U. S. 449, 466. And *Bates* v. *Little Rock*, 361 U. S. 516. Yet, in *Gibson* v. *Florida Legislative Investigation Committee* (108 So. 2d 729, cert. den. 360 U. S. 919), it was held by the Florida Supreme Court that a State legislative investigating committee could demand identification of N.A.A.C.P. members in an investigation of whether "organizations operating in Florida in the field of race relations" had been infiltrated by "Communists and Communistic influences". Exposure of an individual's N.A.A.C.P. membership could be compelled in such an investigation, the Court held, if he had been charged with a Communist connection even though he denied it (108 So. 2d at pp. 739, 744, 745).

In sum, the subcommittee violated the First Amendment in subpoenaing and interrogating petitioner, because its investigation of public opposition to the Committee's continuance effects a drastic curtailment of First Amendment

rights, with no justification in terms of a compelling legislative purpose served by the interrogation.

Respectfully submitted,

NANETTE DEMBITZ,
ROWLAND WATTS,
c/o American Civil Liberties Union,
156 Fifth Avenue,
New York 10, N. Y.,
Counsel for Petitioner.

November 1960